May 30, 1996

OPINION NO. 96-032

Richard G. Ward
Inspector General
State Office Tower II
77 South High Street
Columbus, Ohio 43215

Dear Inspector General Ward:

I have received your request for an opinion asking whether the office of Inspector General has jurisdiction to investigate the management and operation of the five state retirement systems. The office of Inspector General is authorized to investigate "state agencies" and also, upon receipt of specific complaints, to investigate state officers and state employees who work for "state agencies." *See* R.C. 121.42(A)-(B); R.C. 121.46; *see also* R.C. 121.41(E)-(F). Therefore, the threshold question presented by your request is whether the retirement systems are "state agencies."

The General Assembly has expressly defined the term "state agency" for purposes of R.C. 121.41-.50 governing the office of Inspector General. R.C. 121.41(D) provides that "_[s]tate agency_ has *the same meaning as in section 1.60 of the Revised Code but does not include* any of the following: (1) The general assembly; (2) Any court; (3) The secretary of state, auditor of state, treasurer of state, or attorney general and their respective offices." (Emphasis added.) None of the three exceptions set out in R.C. 121.41(D) apply to the state retirement systems.[1] Your question

[1] The Auditor of State sits on the board of each retirement system and the Attorney General sits on the board of each system, except that of the Highway Patrol. R.C. 145.04(A), (B); R.C. 742.03(B); R.C. 3307.05; R.C. 3309.05; R.C. 5505.04(A). The Attorney General is also designated as the legal advisor of each system. R.C. 145.10; R.C. 742.09; R.C. 3307.13; R.C. 3309.13; R.C. 5505.23. The Treasurer of State is the custodian of the funds of each system. R.C. 145.26; R.C. 742.40; R.C. 3307.12; R.C. 3309.12; R.C. 5505.11. Although the Auditor of State, the Treasurer of State, and the Attorney General have these specific statutory duties with respect to the retirement systems, the retirement systems themselves do not constitute any part of the "respective offices" of the Auditor, Treasurer, or Attorney General. Thus, I conclude that the express exceptions for these officers cannot be interpreted to extend to the retirement systems as a whole.

therefore requires that I examine whether the retirement systems are "state agencies" as defined at R.C. 1.60. R.C. 1.60 provides that "[a]s used in Title I of the Revised Code [state government], _state agency,_ except as otherwise provided in the title, means every organized body, office, or agency established by the laws of the state for the exercise of any function of state government."[2] The concept of state agency embodied in this language of R.C. 1.60 "is appropriately understood as a governmental body or unit that exercises a function of state government on behalf of the state." 1985 Op. Att'y Gen. No. 85-089 at 2-368.

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[2] I note as a caveat, that even though R.C. 1.60 states that the definition of state agency therein applies to all of Title I of the Revised Code, the term state agency is not used consistently throughout Title I. For some purposes in Title I, the term itself is redefined or limited. *See, e.g.*, R.C. 121.41(D). A determination of whether other provisions of Title I apply to a particular entity may be based on factors other than or in addition to that entity's status as a "state agency." For example, the civil service provisions of R.C. Chapter 124 apply to persons in "the service of the state," rather than to officers or employees of state agencies. R.C. 124.01; *In re Ford*, 3 Ohio App. 3d 416, 446 N.E.2d 214 (Franklin County 1982). Provisions of R.C. Chapter 127 relating to the controlling board apply to a state agency's use of appropriated funds, but not to the use of other types of funds. Thus, a conclusion that an entity is or is not a state agency as defined at R.C. 1.60 does not determine the extent to which any particular provision of Title I applies to that entity.

The first elements of the R.C. 1.60 definition - that the entity be statutorily created and be an organized body, office, or agency - are clearly satisfied by the retirement systems. The five state retirement systems are the Public Employees Retirement System (PERS), governed by R.C. Chapter 145, the Police and Firemen's Disability and Pension Fund (PFDPF), governed by R.C. Chapter 742, the State Teachers Retirement System (STRS), governed by R.C. Chapter 3307, the School Employees Retirement System (SERS), governed by R.C. Chapter 3309, and the State Highway Patrol Retirement System (HPRS), governed by R.C. Chapter 5505. Each retirement system is expressly established by statute for the purpose of providing retirement and disability benefits to specified categories of public servants and their beneficiaries. *See* R.C. 145.03(A); R.C. 742.02; R.C. 3307.03; R.C. 3309.03; R.C. 5505.02. The administration and management of each retirement system is vested in a board of trustees, the composition of which is defined by statute. *See* R.C. 145.04; R.C. 742.03(B); R.C. 3307.04-.05; R.C. 3309.04-.05; R.C. 5505.04(A). Each board holds title to the assets of its system. *See* R.C. 145.09; R.C. 742.11(E); R.C. 3307.03; R.C. 3309.03; R.C. 5505.06(E). Membership in each system, the conditions for receiving benefits, and the formulas for determining the amount of any benefit due are established by statute. *See generally* R.C. Chapter 145; R.C. Chapter 742; R.C. Chapter 3307; R.C. Chapter 3309; R.C. Chapter 5505. The systems are funded by mandatory contributions from the member employees and their respective public employers. Contributing public employers include both state and local governmental entities. *See* R.C. 145.47; R.C. 145.48; R.C. 742.31; R.C. 742.33-.34; R.C. 3307.51; R.C. 3307.53; R.C. 3309.47; R.C. 3309.49; R.C. 5505.15.[3] The monies of the systems are kept in statutorily designated funds, which funds are "separate and distinct legal entities" for all purposes except deposit and investment. R.C. 145.23; R.C. 145.25; R.C. 742.38; R.C. 742.39; R.C. 3307.65; R.C. 3307.66; R.C. 3309.60; R.C. 3309.61; R.C. 5505.03(A). It is apparent from this brief overview that each retirement system is established by the laws of this state and can be characterized as "a collective whole or totality...a number of particulars regarded as forming a system," or "body" as that term is commonly understood. *See Webster's Third New International Dictionary* 246 (unabridged ed. 1993). Thus, the first two elements of the definition of "state agency" at R.C. 1.60 are satisfied. The critical issue, therefore, with respect to satisfying the elements of the R.C. 1.60 definition, is whether the retirement systems have been established to act on the state's behalf "for the exercise of any function of state government."

The provision of retirement benefits to public employees is a means of providing for the welfare of employees generally and, in the case of school teachers and employees, also a means of providing for a public school system, both of which are recognized as matters within the authority of

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[3] PFDPF also receives an annual appropriation from the state, apart from any contribution that may be due from the state in its capacity as an employer. R.C. 742.36. The employer contribution for HPRS is made through a direct appropriation by the General Assembly to HPRS. R.C. 5505.15. The boards of trustees of PERS, STRS, SERS, and HPRS maintain the actuarial soundness of those systems by adjusting the required employer contributions within statutorily set limits. R.C. 145.48; R.C. 3307.53; R.C. 3309.47; R.C. 3309.49; R.C. 5505.12. For PFDPF, the Ohio Retirement Study Commission recommends necessary changes in contribution rates to the General Assembly. R.C. 742.311.

state government. *See* Ohio Const. art. II, § 34; Ohio Const. art. VI; *State Teachers Retirement Bd. v. Board of Tax Appeals*, 177 Ohio St. 61, 62, 202 N.E.2d 418, 419 (1964) (authority to create the STRS arises from Ohio Const. art. VI); *State ex rel. Bd. of Trustees of Police and Firemen's Pension Fund v. Board of Trustees of Police Relief, and Pension Fund*, 12 Ohio St. 2d 105, 233 N.E.2d 135 (1967) (authority to create the PFDPF arises from Ohio Const. art. II, § 34). However, the fact that the General Assembly is constitutionally authorized to provide for the creation and management of the retirement systems and that the systems serve a legitimate purpose of state government does not mean, in and of itself, that the systems have been established as "state agencies." To exercise a function of state government inherently means to act on behalf of the state in performing that function. 1985 Op. Att'y Gen. No. 85-089 at 2-368 (a state agency, as exemplified by the provisions of R.C. 1.60, "is appropriately understood as a governmental body or unit that exercises a function of state government on behalf of the state").[4] The retirement systems do not exercise their statutory functions on behalf of the state. The members of the boards of the systems are expressly designated as trustees of the funds in each system and expressly charged with the duty to administer the funds "solely in the interest of the participants and beneficiaries; for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the system." *See* R.C. 145.11(B); R.C. 742.11(B); R.C. 3307.15(B); R.C. 3309.15(B); R.C. 5505.06(B). This statutorily established fiduciary relationship is inconsistent with the concept of agency. A fiduciary or trustee, by virtue of the duty to act solely in the interest of designated beneficiaries, does not function as an agent of the person or entity that created the fiduciary relationship. *See, e.g., Kuck v. Sommers*, 59 Ohio L. Abs. 400, 408, 100 N.E.2d 68, 75 (Ct. App. Mercer County 1950); *Central Trust Co. v. McCarthy*, 80 N.E.2d 821 (C.P. Hamilton County 1943), *aff'd* 73 Ohio App. 431, 57 N.E.2d 126 (Hamilton County 1943). *See generally State ex rel. Preston v. Ferguson*, 170 Ohio St. 450, 464, 166 N.E.2d 365, 375 (1960) (recognizing the trust

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[4] I am aware of no case law interpreting the statutory definition of "state agency" now codified at R.C. 1.60, although it has been part of the Revised Code since 1977. *See* 1977-1978 Ohio Laws, Part I, 511 (Am. Sub. S.B. 221, eff. Nov. 23, 1977); *see also* 1985-1986 Ohio Laws, Part I, 1943 (Am. Sub. H.B. 201, eff. July 1, 1985). There are cases that have used the term state agency to describe the retirement systems in the course of analyzing other issues, but the status of the systems for purposes of R.C. 1.60 was not at issue in these cases. *See, e.g., State Teachers Retirement Bd. v. Kinney*, 68 Ohio St. 2d 195, 196, 429 N.E.2d 1069, 1070 (1981); *In re Ford*, 3 Ohio App. 3d 416, 446 N.E.2d 214 (Franklin County 1982).

characteristics of SERS); 1927 Op. Att'y Gen. No. 110, vol. I, p. 174, 175 (same with respect to STRS). Thus, the relationship between the state and the retirement systems is not one of agency, because the systems have not been created to exercise functions of state government on behalf of the state. Accordingly, the retirement systems are not state agencies as defined by R.C. 1.60.

It is, therefore, my opinion, and you are hereby advised, that the Inspector General has no jurisdiction to investigate the Public Employees Retirement System, R.C. Chapter 145, the Police and Firemen's Disability and Pension Fund, R.C. Chapter 742, the State Teachers Retirement System, R.C. Chapter 3307, the School Employees Retirement System, R.C. Chapter 3309, and the State Highway Patrol Retirement System, R.C. Chapter 5505, because the systems are not state agencies, as that term is defined at R.C. 121.41(D) and R.C. 1.60, for purposes of the statutes governing the powers and duties of the Inspector General.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

May 30, 1996

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SYLLABUS: 96-032

The Inspector General has no jurisdiction to investigate the Public Employees Retirement System, R.C. Chapter 145, the Police and Firemen's Disability and Pension Fund, R.C. Chapter 742, the State Teachers Retirement System, R.C. Chapter 3307, the School Employees Retirement System, R.C. Chapter 3309, and the State Highway Patrol Retirement System, R.C. Chapter 5505, because the systems are not state agencies, as that term is defined at R.C. 121.41(D) and R.C. 1.60, for purposes of the statutes governing the powers and duties of the Inspector General.